Office Supreme Court,
FILED
APR 27 192
WM. R. STANSBU
CLE

Supreme Court of the United States.

OCTOBER TERM, 1924. No. 617.

REAL SILK HOSIERY MILLS, INCORPORATED,
Plaintiff and Appellant,

against

CITY OF PORTLAND, A MUNICIPAL CORPORATION, *et al.*, ETC.,
Defendants and Appellees.

APPEAL FROM CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

BRIEF OF AMICUS CURIAE.

DAVID PAINE,
Amicus Curiæ.

WHITE & CASE,
14 Wall Street,
New York.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States.

REAL SILK HOSIERY MILLS, INCORPORATED,
Plaintiff and Appellant,

AGAINST

CITY OF PORTLAND, a municipal corporation, *et al.*, etc.,
Defendants and Appellees.

BRIEF OF DAVID PAINE, *AMICUS CURIÆ*, IN SUPPORT OF APPEAL.

Statement.

The appellant here seeks to enjoin the City of Portland, Oregon, from enforcing an ordinance. This ordinance, in sum, applies to solicitors who receive advance payments from customers. It requires of them (1) a license fee of from $5 to $10, if paid monthly, and (2) a bond for $500, executed by either a surety company, or by two responsible freeholders of Portland (or a cash bond of equal amount) as security for final delivery of the goods, or in lieu thereof, for return of the advance payment. The question is, whether the ordinance is a valid exercise of the police power, or is an interference with interstate commerce so far as it affects the soliciting agents of corporations foreign to Oregon.

The District Court of Oregon held adversely to plaintiff on these two questions and declined to issue a decree restraining the defendants.

The Circuit Court of Appeals, in an opinion filed

April 21, 1924, by Morrow, *C. J.*, concurred in by Hunt and Rudkin, *C. JJ.*, affirmed the District Court. The essentials of the record consist of the bill and defendants' motion to dismiss, in effect for insufficiency. It is this motion, granted by Judge Bean by formal decree, dated December 24, 1923, which is before this court.

Facts Presented by *Amicus Curiæ*.

The appellant here, Real Silk Hosiery Mills, Incorporated, is engaged in selling articles of wear. This ordinance, however, affects any business, no matter where located, which depends on agents and solicitors in Portland for obtaining orders, provided a deposit is required at the time of the order.

The attention of the court is particularly called to the situation so far as it concerns magazine publishers. A fact so well known that this court may take judicial cognizance of it, is, that subscriptions to magazines are obtained almost entirely through solicitors who collect a part, if not all, the subscription price of one or several magazines for a year in advance. Where several magazines are sold together at a slight reduction under their combined cost, such an arrangement is called a "Club" subscription.

It seems also a fit subject for judicial notice that these soliciting agents are, in a vast majority of cases, school boys, teachers and others who are seeking to eke out a livelihood by obtaining orders for magazines and periodicals during off hours. Little consideration is needed to convince anyone that these classes of subscription agents, operating without capital, and required to obtain payment of subscriptions in advance, will disappear with the

enforcement of the onerous conditions of the ordinance.

Magazines sold by the year are always cheaper to the subscriber than by the copy, but subscriptions must be paid in part, at least, in advance. It would be entirely impracticable to do otherwise. Thus the securing of magazine subscriptions may come directly under the Portland ordinance.

A typical case is that of the Crowell Publishing Company, which publishes in New York and sells in Oregon, and throughout the Union, the following magazines: *Woman's Home Companion, The American, Farm and Fireside,* and *Mentor.* No subscriptions are accepted by the agent but all are forwarded to the Company's office at Springfield, Ohio, for acceptance. There the contracts are accepted or rejected. It is estimated by this corporation that a loss of subscription and advertising revenue, in case of the enforcement by municipalities generally of bond and license ordinances for canvassers, will amount to the following annually:

Circulation	$5,228,570
Advertising	5,807,259
	$11,036,029

Ordinances similar to that of Portland have been passed in the following cities:

Eugene, Oregon	Burlingame, California
Yakima, Washington	Fullerton, "
Sacramento, California	Piedmont, "
Pasadena, "	Pomona, "
Stockton, "	Richmond, "
Anaheim, "	
Minneapolis, Minnesota	Harlowtown, Montana
Clarinda, Iowa	Hammond, Louisiana
Prescott, Arizona	Lake Charles, "
Wenatchee, Washington	Bougolusa, "
Minot, North Dakota	Franklin, "
	Morgan City, "

Magazine publishers operate, in general, in a three-fold manner so far as payment by subscribers is concerned:

(*a*) The full amount of a year's subscription is payable with the order. From it the agent deducts his commission. This is the usual method.

(*b*) A deposit is taken, less than the soliciting agent's commission. He retains the deposit and is paid an additional amount by the publisher.

(*c*) The deposit goes entirely to the soliciting agent and is his sole compensation.

It will be noted that (*c*) above, is identical with the method of remunerating the canvassers for appellant here, as disclosed by the bill.

In all cases the publisher makes the solicitor its agent for that purpose, and the orders taken are transmitted to the publisher outside the state, and thereupon issues of the magazine subscribed for are sent, by mail direct to the subscriber within the State of Oregon. They go in uninterrupted interstate mail transshipment from the publisher to the subscriber.

It is the contention of the *amicus curiæ* that in such case the obtaining of the order through the soliciting agent is an indispensable element of interstate commerce and cannot be separated as an isolated transaction from the business of printing and selling periodicals. Hence, that the attempt to require of the soliciting agent a license fee and a bond for $500, is a direct burden on interstate commerce and hence unconstitutional.

I.

The ordinance, as amended, is unconstitutional so far as it applies to soliciting agents of corporations engaged in interstate commerce.

The basic question, of course, is, what is interstate commerce? This court has, since its earliest days, discussed this subject in connection with the police powers of the states, and more recently in relation to the Anti-Trust Laws.

The court in *Addystone Pipe & Steel Co.* v. *United States*, 175 U. S. 211, said:

> "As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196-203; *Kidd* v. *Pearson*, 128 U. S. 1, 20."

Clearly, then, the obtaining of orders for goods to be manufactured and shipped from another state, is an essential part of interstate commerce. The expense and attention devoted to advertising throughout the land, and the trained salesmen who are sent throughout the several states, bear witness to the importance of the soliciting agent as an element of business. So that an attempt to require a license fee from agents who obtain orders for goods moving in interstate commerce, is a direct burden upon that commerce. So, too, an attempt to require a bond to secure the carrying out of in-

terstate commerce contracts, is direct interference with interstate commerce. The relation between bond and contract could not be more direct. The condition of the bond is:

> "* * * the making of final delivery of the goods ordered, or services to be performed, in accordance with the terms of such order, or failing therein, that the advance payment on such order be refunded. Any person aggrieved by the action of any such solicitor shall have a right of action on the bond for the recovery of money or damages, or both" (Record, p. 4).

The requisite bond, then, applies directly to interstate shipment.

The Circuit Court of Appeals, in its opinion, laid stress on the fact that the purposes of the Act were benign, and that an emergency existed. But in no case has either circumstance been allowed to uphold an unconstitutional act. It is obvious too, on reflection, that the result desired can be accomplished legally.

The court dwells on the fact that a deposit is made by the purchaser, which is retained by the solicitor, in the instant case, as payment for his services in full and as his sole compensation. It then concludes that the solicitor has no further interest in the matter, and that the plaintiff has no interest in the advance payment made by the purchaser to the solicitor, and hence the transaction between solicitor and customer is an independent one and is intra-state instead of interstate.

This reasoning seems lacking in logic. Certainly, solicitors are entitled to payment for their services. The entire amount paid by the purchaser to the solicitor is credited on the purchase price for the merchandise sold by the Real Silk Hosiery Com-

pany, and whether it is used to recompense the salesman or not, is of no moment. Would the situation be different if the solicitor collected the entire price of the order from the customer and forwarded part to the manufacturer, or collected, as a deposit, less than the amount of his compensation in each case and received a small payment from the manufacturer? It is not apparent how these circumstances can change the situation. The transaction must be viewed as a whole. It is all a part, and a very essential part, of the interstate trade in the articles sold.

As pointed out in the statement herein, publishing houses selling magazines, follow the three methods outlined. It is questionable whether that in any way differentiates them from the appellant here.

Clearly the transaction between solicitor and customer has but one purpose in view, so far as the customer is concerned, *i. e.,* the obtaining of goods. He does not pay, or agree to pay, the solicitor's compensation. He simply wishes to place a binding order with the manufacturer, for delivery direct to him C. O. D., of the goods ordered. As a requisite of that transaction, he pays to the company, through its agent, a deposit. To be sure the agent, by private agreement with his company, has the right to retain it, but, so far as the transaction between company and customer is concerned, the application which the company makes of the deposit is not pertinent so long as it is credited on the purchase.

In the Circuit Court of Appeals three cases were relied upon. They are easily distinguishable.

The first is *Pennsylvania Railroad Co.* v. *Knight,* 192 U. S. 21, 27-28. In that case the Pennsylvania Railroad maintained a cab service to take passen-

gers to and from its terminal in the City of New York. New York imposed a license tax, which the Company resisted on the ground that the cab service was part of interstate commerce. It is plain that this cab service had no direct relation to the interstate transportation carried on by the Railroad. It was not a continuous, integral part of that transportation system. It was one of many local cab services available to the passengers who had completed their trip on the lines of the Pennsylvania into New York.

A very different situation had been presented if an attempt had been made by New York or New Jersey to tax the ferry boats, which, in those days, were the sole means for completion of the trip from the terminus of the Pennsylvania Railroad at Jersey City to New York City. Then interstate commerce would have been directly affected.

The recent case of *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, was cited by the court below. That case had to do with the Blue Sky Law of Ohio, wherein was provided a license tax and certain prohibitions to prevent frauds in the sale of bonds and like securities. The Geiger-Jones Company was engaged in the business of buying and selling, in Ohio, investment securities of corporations of Ohio and other states. It was attempted to upset this statute on the ground that it interfered with interstate commerce so far as it related to the sale of securities of corporations of a state other than Ohio. There was nothing to this. The shares of stock and bonds brought into the State of Ohio and there sold by the Geiger-Jones Company, were as much subject to State legislation as though Geiger-Jones were conducting a grocery and incidentally sold ripe olives from California. No one would be

heard to say, in these circumstances, that the grocer could not be regulated by municipal ordinance. The two transactions are entirely separate.

Much store, however, is set upon certain dicta in that decision where Mr. Justice McKenna said:

> "Is anything more necessary for the supremacy of the national power than that they be kept free when in actual transportation, subjected to the jurisdiction of the State only when they are attempted to be sold to the individual purchaser?"

The question thus asked is not answered by the learned Justice. It, probably, was not even intended as dicta. It was unnecessary to a decision of the case. It could not well have been the meaning of this court to upset its authoritative opinions in *McCall* v. *California*, 136 U. S. 391, and *Texas Transport & Terminal Co.* v. *City of New Orleans*, 44 S. C. Reporter 242 (decided February 18, 1924). These cases will be presently discussed.

Very obviously it was not necessary for the court, in its opinion in the Blue Sky case, to hold that illegal interference in interstate commerce consisted of interference after the goods or choses in action had become part of the stream of transportation from one state to another. Its language, fairly construed, does not go so far. There were two independent transactions, one, the bringing of the securities into the State of Ohio, and second, the buying and selling of them there by the complainant. It was this buying and selling that was sought to be regulated. It had no direct bearing on the movement of the securities in interstate commerce, the fact that they had their origin in another state being of no moment.

With regard to the effect to be given dicta, the

familiar words of Chief Justice Marshall are of abiding force. He said in *Cohens* v. *Virginia*, 6 Wheat. 264 (399):

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

It is not necessary to give to the *obiter dicta* in the *Blue Sky* case the effect of a direct pronouncement by this court.

The same holds true of *Plumley* v. *Massachusetts*, 155 U. S. 461, the oleomargarine case. There it was logically held that a requirement that oleo be not artificially colored, unless sold under its own name, was not an interference with interstate commerce. It was notorious that oleo was being sold in imitation of dairy butter, and colored for that purpose, its normal color being different from that of butter. The State of Massachusetts required that it either be sold as oleo, even if artificially colored, or else that the coloring be omitted. This was not an interference with trade in oleomargarine, for one wishing to buy that product was not in any way restrained from doing so, nor was any attempt made to curtail orders or hamper the obtaining of orders in it. The provision simply was that it should not be sold as something else.

The cases of *McCall* v. *California, supra,* and *Texas Transport Co.* v. *New Orleans, supra,* are of controlling force here.

They contain the clear principles of *Brennan* vs. *Titusville,* 153 U. S. 289; *Robbins* vs. *Shelby Taxing District,* 120 U. S. 489, and *Ging* vs. *Michigan,* 135 U. S. 161-165.

In the *McCall* case an attempt was made to tax an agent of the Erie Railroad Company, which maintained an office and solicited business in the City of San Francisco. The Erie, of course, does not go to San Francisco. Its western terminus is Chicago. The business of the agent was to secure passengers and freight who traveled eastward from Chicago over the lines of the Erie. He was fined for violation of an ordinance requiring railroad agencies to pay a license fee. Mr. Justice Lamar said:

> "His employment was limited exclusively to inducing persons in the State of California to travel from that State into and through other States to the City of New York. To what, then, does his agency relate except to interstate transportation of persons? Is not that as much an agency of interstate commerce as if he were engaged in soliciting and securing the transportation of freight from San Francisco to New York City over that line of railroad? If the business of the New York, Lake Erie & Western Railroad Company, in carrying passengers by rail between Chicago and New York and intermediate points in both directions, is interstate commerce, as much so as is the carrying of freight, it follows that the soliciting of passengers to travel over that route was a part of the business of securing the passenger traffic of the company. The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the 'means' by which the company sought to increase and

> doubtless did increase its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it therefore was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

There seems nothing whatsoever to distinguish this *McCall* case from the one at bar, except the immaterial distinction that in the instant case a deposit is paid by the customer at the time of signing the order.

The latest pronouncement by this court on the subject is *Texas, etc., Co.* v. *New Orleans, supra.* Therein the City of New Orleans sought to recover from the plaintiff a license tax of $400 upon its business as steamship agent. This was resisted as in contravention of the commerce clause of the Constitution. The plaintiff was an agent for various steamship companies and ship owners, all exclusively engaged in interstate commerce. Mr. Justice Sutherland says:

> "The service rendered consisted of soliciting and engaging cargo, * * * collecting freight charges, paying ships' disbursements, attending to immigration service, and assisting generally in matters of local customs and regulations. Freight moneys collected, after deducting commissions, were remitted to the owners or charterers."

The case, then, is directly in point, for in the *Texas* case, as here, the soliciting agent received his pay through commissions on the freight collected. The court then points out that frequent occasion has arisen to consider the effect of taxes of this char-

acter, and that this court has held that to impose a tax upon one engaged in selling the goods of a nonresident within the state, or upon persons securing the transportation of freight in interstate commerce, is unconstitutional on account of the interstate character of the business conducted This court then held that the attempt to levy the tax by the City of New Orleans was an interference with interstate commerce.

That case was based on an ordinance which provided a graduated tax, determinable by the business done. The instant case is not of that character. The tax is levied without regard to the amount of business. For instance, a school boy, obtaining a subscription for one year's issue of the *Youth's Companion,* must pay the same fee and furnish the same bond, as the largest magazine agency in the City of Portland. The tax is the same in each case. Hence the case is not at variance with the views expressed by Mr. Justice Brandeis and Mr. Justice Holmes, who dissented from the opinion of Mr. Justice Sutherland, *supra,* for in the dissenting opinion it is said:

> "On the other hand, the burden is deemed direct, where the tax is upon property moving in interstate commerce * * *; or where an occupation tax is laid upon one who, like a drummer or delivery agent, is engaged exclusively in inaugurating or completing his own or his employer's transaction in interstate commerce."

The soliciting agents of the appellant and of the magazine publishers, in whose behalf this brief is submitted, fall directly within the last classification. They are engaged in inaugurating interstate business. They are an essential part of it, and as

much so as the transportation of the goods or magazines themselves. They are taxed indiscriminately, and the result of the tax and of the regulations will be destructive to the business of most of them.

It is difficult, then, to escape the conclusion that the ordinance in question is invalid as an interference by the state with interstate commerce and a direct burden on such commerce.

CONCLUSION.

The decree of the District Court, as affirmed by the Circuit Court of Appeals, should be reversed.

Respectfully submitted,

DAVID PAINE,
Amicus Curiæ.

04783